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Business Owner Pleads Guilty to Attempted Monopolization in Violation of Section

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On October 31, the Antitrust Division of the US Department of Justice (DOJ) delivered on its promise to pursue criminal enforcement of Section 2 of the Sherman Act when it **secured a guilty plea from a highway paving contractor** who propositioned his main competitor to enter into a market allocation scheme in an attempt to monopolize markets for highway crack sealing services.

The plea marks the first criminal enforcement under the monopolization statute of the Sherman Act in more than 40 years, and represents yet another step in the efforts of the DOJ and Federal Trade Commission (FTC) to dust off lesser-used theories, statutes, and case law to **pursue an aggressive approach to antitrust enforcement**.[1] The prosecution comes after **a deputy assistant attorney general asserted** that the DOJ had "effectively ignored Section 2 when it came to criminal enforcement" since the 1970s.

The DOJ's criminal enforcement has traditionally focused on conspiracy fact patterns involving *per se* unlawful agreements between competitors, such as those to fix prices or allocate markets. Against that backdrop, the remarks of DOJ leadership forecasting an interest in criminal enforcement of the monopolization statute sparked questions about how the DOJ would identify which monopolization violations were egregious enough to prosecute criminally, given that there is no *per se* or bright-line rule in the Section 2 context that distinguishes between lawful versus unlawful exclusionary conduct. In fact, many courts struggle to differentiate between the two even when assessing alleged civil violations of the monopolization statute.

This recent action provides some guidance, though perhaps only in a limited context. The conduct of the contractor, Nathan Zito, involved an invitation to **conspire** to allocate markets and avoid competing. It is thus akin to an "attempt" to criminally conspire, and it more closely resembles a traditional criminal antitrust enforcement case rather than a civil monopolization case. In this sense, while the case is certainly noteworthy and demonstrates the DOJ's commitment to pursuing such invitations to conspire criminally under Section 2 – as opposed to civilly, as it has on at least one occasion in the past – its significance should not be overstated.

United States v. Zito: An invitation to collude to divide markets

According to the charging document, in January 2020, Zito invited his main competitor to allocate markets for highway crack sealing projects. Instead of agreeing to Zito's proposal, however, the competitor reported the incident to the DOJ, providing the government with evidence of Zito's proposal and anticompetitive intent through recorded phone calls. Specifically, Zito proposed that he would withdraw from bidding on crack sealing projects in Nebraska and South Dakota if his competitor would withdraw from competing for such projects in Montana and Wyoming. Zito also offered to pay his competitor for lost business in Montana and Wyoming, and he proposed that they memorialize the market allocation agreement.

The facts underlying the DOJ's prosecution closely resemble a textbook market allocation scheme but for one important fact: There was no agreement. Like price fixing, market allocation agreements are generally criminally prosecuted by the DOJ under Section 1 of the Sherman Act, which requires evidence of an anticompetitive agreement between competitors for a finding of liability. In this case, however, there was no agreement because Zito's competitor did not accept his invitation to collude.

If Zito's competitor had accepted the proposal, the DOJ almost certainly would have prosecuted the scheme under Section 1. Instead, the DOJ charged the conduct as criminal attempted monopolization under Section 2, alleging that Zito and his competitor were frequently "the only two companies that submit bids for crack sealing projects" in the region. Thus, the DOJ argued, a successful market allocation scheme would have effectively allowed each to obtain a monopoly in their allocated states. Consistent with that premise, Zito pled guilty to knowingly proposing the market allocation arrangement "with a specific intent to gain monopoly power in the markets for highway crack sealing services in Montana or Wyoming."

Prior enforcement of invitations to collude

In the past, the DOJ and the FTC have brought civil actions challenging invitations to collude.

For the past 30 years, the FTC has scrutinized invitations to collude across various industries, ranging from **healthcare-related distribution** to **truck rentals** under Section 5 of the FTC Act – a civil statute that prohibits "unfair or deceptive acts or practices in or affecting commerce" (15 USC § 45). For example, the FTC has alleged that a publisher of coupon booklets unlawfully invited its only competitor to collude through the president and CEO's public statement made during an earnings call. Another example involves **the civil actions against Nationwide Barcode and InstantUPCCodes.com**, in which the FTC alleged that a principal of one entity invited his competitor via electronic message to increase the prices for barcodes sold over the internet.

The DOJ also has criminally prosecuted invitations to collude as mail fraud and wire fraud, where communications took place by telephone, fax or email. Those types of criminal enforcement actions are expected to continue. In addition, in 1983, in ***United States v. American Airlines, Inc.***, the DOJ brought a civil attempted monopolization case against American Airlines and its president for unsuccessfully inviting American's major competitor, Braniff Airlines, to fix prices on certain city pair routes out of Dallas/Fort Worth International Airport. Braniff – like Zito's competitor – did not agree to the proposal but instead cooperated with the DOJ. Absent an agreement on which to base a Section 1 charge, the DOJ brought an attempted monopolization action on the theory that the price-fixing scheme, if agreed upon, would have allowed these competitors to jointly monopolize the market for commercial air travel on the routes.

The "shared monopoly" theory has been criticized over the years, where the attempt was to jointly fix prices in a single market, but that criticism seems less applicable to an effort to divide markets, as in the Zito prosecution.

Relatedly, the agencies also have put down a marker that they intend to pursue signaling cases in which a competitor publicly signals its firm's interest in engaging in coordinated price increases or capacity cuts, causing competitors to raise prices or reduce output. For example, FTC Chair Lina Khan warned of the antitrust implications companies may face in the current inflationary environment for **"signaling to each other that they're looking to engage in coordinated price hikes"** through public statements.

Important considerations for companies

The DOJ is criminally prosecuting invitations to collude where the conduct resembles a failed attempt to form a cartel and the agreement, if executed, would allow the firms involved to monopolize markets. Penalties can be stiff and may involve jail time, with violations of the Sherman Act carrying a maximum sentence of up to 10 years' imprisonment and a maximum fine of up to $1 million.

Civil enforcement of certain invitations to collude is likely to continue. In particular, the FTC and the DOJ are focusing on invitations to collude and signaling fact patterns predicated on public statements that appear to be aimed at facilitating coordinated price hikes or capacity cuts. Companies should consider consulting counsel before publicly commenting (e.g., in earnings calls or industry conferences) on strategy with respect to future pricing, capacity, output, or customers.

As the DOJ and the FTC take a more aggressive tack on antitrust enforcement, it is important for companies to invest in an antitrust compliance program and regularly train personnel to reduce the likelihood of criminal and civil liability. The **DOJ has made clear** that in evaluating charging decisions in criminal antitrust investigations, it will evaluate the effectiveness and robustness of a company's pre-existing antitrust compliance program, suggesting that an effective antitrust compliance program may prove critical in the face of criminal Section 2 charges.

Note:

1. Other notable efforts include the DOJ's recent wave of enforcement aimed at unwinding certain "**interlocking directorates**," which are prohibited under Section 8 of the Clayton Act; the FTC's efforts to reinvigorate Section 3 of the Clayton Act, which prohibits certain exclusionary distribution practices; and the DOJ's ongoing efforts to pursue criminal *per se* treatment of **wage-fixing and no-poach agreements**.

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